121-383

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 173.

WILLIAM M. FISHER AND THOMAS DUBOIS, PLAINTIFFS IN ERROR,

vs.

EZRA KELSEY AND HENRY A. LANMAN, EXECUTORS OF WILLIAM KELSEY, DECEASED, AND BENJAMIN STICKNEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 15, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 The United States of America to William Kelsey and Benjamin Stickney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein William M. Fisher and Thomas DuBois are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the district court of the United States for the eastern district of Missouri, this sixth day of June, in the year of our Lord one thousand eight hundred and eighty-three.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

1*a* [Endorsed:] No. 2015. United States circuit court, eastern district of Missouri. William M. Fisher & Thomas DuBois *vs.* William Kelsey and Benjamin Stickney. Citation. Filed Jun. 6, 1883. A. P. Selby, clerk.

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *ss:*

I hereby certify that I have served the within writ by delivering a copy thereof to John W. Noble, of the firm of Noble & Orrick, the attorneys of record of the within-named William Kelsey and Benjamin Stickney, on the 16th day of June, A. D. 1883, in the city of St. Louis, in the above district.

FELIX COSTE, *U. S. Marshal,*
By ERNST LINDEMAN, *Deputy.*

Fees:

1 service	$2 00
1 mile	06
	$2 06

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the March term, 1883, thereof, between William M. Fisher and Thomas DuBois, plaintiffs, and William Kelsey and Benjamin Stickney, defendants, a manifest error hath happened, to the great damage of the said plaintiffs, William M. Fisher and Thomas

DuBois, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixth day of June, in the year of our Lord one thousand eight hundred and eighty-three.

Issued at the office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk Circuit Court United States,
Eastern District of Missouri.

Allowed by—
SAMUEL TREAT, *Judge.*

Return to Writ.

2*a* [Endorsed:] United States circuit court, eastern district of Missouri. William M. Fisher & Thomas DuBois *vs.* William Kelsey & Benjamin Stickney. Writ of error to the circuit court of the U. S., eastern district of Missouri. Returned and filed. Filed Jun. 6, 1883. A. P. Selby, clerk.

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of St. Louis, this 13th day of June, A. D. 1883.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

3 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States in and for Said District.
September Term, 1882.

Be it remembered that on the ninth day of May, A. D. 1882, there was filed in said court a certain petition in words and figures following, to wit:

Petition.

WILLIAM M. FISHER and THOMAS DUBOIS, Plaintiffs,
vs.
WILLIAM KELSEY and BENJAMIN STICKNEY.

Plaintiffs state that they now are and were at the time and times hereinafter stated citizens and residents of the city of Providence, in the State of Rhode Island, and partners in trade and doing business under the firm name and style of Wm. M. Fisher & Co., and at the time and times hereinafter stated they, together with one Josiah W. Richardson, composed the firm of Wm. M. Fisher and Co., and that said Josiah W. Richardson has since died, and that they are surviving partners of said firm.

That defendant William Kelsey is a citizen and resident of the city of Columbus and State of Ohio, and that defendant Benjamin Stickney is a citizen of the city of St. Louis, State of Missouri, in the eastern district thereof, and that at the times hereinafter stated they were partners doing business under the firm name of Kelsey & Stickney, and were keepers of a common inn in the city of
4 St. Louis and State of Missouri, holding out for and giving to travellers, travelling salesmen, and the travelling public generally conveniences, comforts, & accommodations in the way of rooms, board, & lodgings in the usual course and method of inn-keeping.

That the inn so kept by said defendants was and is known as the "Planters' House."

The plaintiffs further state that before and at the time of the happening of the loss and damage hereinafter mentioned they were engaged in the business of manufacturing and selling gold chains and chain trimmings and ornaments, and in the selling of these goods it was necessary and the practice of the plaintiffs that one of their firm, to wit, Wm. M. Fisher, *to* carry with him, as travelling salesman of said firm composed of the parties aforesaid, said merchandise of great value, and the said articles of gold manufacture lost or taken away, as herein stated, were such as he might reasonably and properly carry with him in trunks and valises with reference to the nature of plaintiffs' said business, and the defendants, at the time said William M. Fisher was received and taken into said inn of the defendants, well knew the character of the plaintiffs' said goods and baggage then in charge of the said Fisher, and the same were considered a part of the accommodations necessary to be afforded them as a guest of said inn.

The plaintiffs further state that on the 12th day of May, 1878, one of the plaintiffs, Wm. M. Fisher, was received into their said inn as a traveller, together with the baggage and goods of said Fisher and plaintiffs, consisting in part of articles of gold manufacture, the same being merchandise for sale and sample belonging to and being the property of plaintiffs.

That while the plaintiffs, by their copartner, Wm. M. Fisher, were then and there the guests of defendants they undertook, for compensation paid or to be paid to them by plaintiffs, to safely keep in said inn such baggage and merchandise for sale and sample as they, the plaintiffs, by their said copartner Fisher, had with him upon entering the inn, and the plaintiffs, by their said copartner, Wm. M. Fisher, thereupon intrusted the defendants with said baggage and goods and left the same in their possession & charge as inn-keepers, and while the plaintiffs, by their said copartner, William M. Fisher, were the guests of the defendants as aforesaid the defendants and their servants so negligently and carelessly conducted themselves in regard to the goods and baggage of said plaintiffs so received in said inn, to wit, the articles of gold manufacture as aforesaid, as follows, to wit:

3,129$\frac{20}{24}$ dwts. gent. gold vest chains, @ 75	$2,347 37
3,721$\frac{10}{24}$ dwts. guard pr. ornamented with slides, @ 85	3,163 20
361$\frac{11}{24}$ dwts. necklaces, ornamented corner & pend. drops, @ 1.00	361 46
94 dwts. light 14 k. Roman necklaces, @ 1.25	117 50
1,099$\frac{15}{24}$ dwts. 14 k. 1 stone cameo & pearl set n'k's, @ 1.15	1,264 57
1,212$\frac{8}{24}$ dwts. 14 k. 1 Roman necklaces, @ 1.15	1,394 18
7,999$\frac{6}{24}$ dwts. guards, stone, ornamental slides, @ 1.10	879 19
2,926$\frac{14}{24}$ dwts. 14 k's bus. & fancy vest chains, @ 92	2,692 46
216 dwts. 14 k't ladies' matinee vests, tassel, @ 1.40	302 40
100 dwts. colored Roman necklaces, @ 80	80 00
6 14 k't patent pencil cases, at 4.00	24 00
	$12,626 32

That while the said articles and goods so remained at said inn the said articles were taken away from the room of the said plaintiffs by some person to the plaintiffs unknown, and thereby the above-described articles and goods of gold manufacture became and were, and ever since have been, and now are, wholly lost to the plaintiffs.

That the said above-described articles of manufacture belonging to the plaintiffs so lost and taken away while the same were under the charge of the defendants were of the value of twelve thousand six hundred & twenty-six dollars and thirty-two cents.

The plaintiffs further state that by reason of the premises as herein stated the plaintiffs have suffered and sustained damage in the sum of fifteen thousand dollars, for which sum they ask judgment.

J. B. WOODWARD &
J. M. & C. H. KRUM,
Att'ys for Pl'ffs.

7 And afterwards, to wit, on September 30, A. D. 1882, an answer was filed in said cause, in words and figures following, to wit:

Answer.

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States in and for said District. September Term, 1882.

WM. M. FISHER & THOMAS DUBOIS, Plaintiffs,

vs.

WILLIAM KELSEY and BENJAMIN STICKNEY, Defendants

The defendants, Wm. Kelsey and Benjamin Stickney, for answer to plaintiffs' petition, deny that plaintiffs, William M. Fisher and Thomas DuBois, were or are partners, as alleged, and deny that plaintiffs, with Jesse W. Richardson, composed the firm of William M. Fisher & Co., as alleged, and deny that plaintiffs are the surviving partners, as alleged.

Defendants admit that they were partners doing business under the firm name of Kelsey & Stickney, and were the keepers of a common inn in the city of St. Louis, and at the time stated, and admit that they were holding out for and giving to travelers conveniences, comforts, and accommodations in the way of rooms, board, and lodging, in the usual course and method of inn-keeping, but deny that said partners were giving to traveling salesmen as such, or otherwise than mere travelers, any conveniences, comforts, or accommodations alleged.

8 Defendants deny that in selling the goods specified in said petition it was necessary for the said Fisher to carry with him, as traveling salesman for the said firm, merchandise of great value, or that the merchandise in the said petition would or could reasonably and properly be carried by said Fisher in trunks and valises with reference to the nature of the plaintiffs' said business. And defendants particularly deny that they knew at the time that said William M. Fisher was received at said inn of the plaintiffs' goods and baggage, then in charge of the said Fisher, or that any such goods and baggage were in the charge of said *said* Fisher (which defendants deny), and defendants deny that the same were considered a part of the accommodations necessary to be afforded him as the guest of said inn.

Defendants deny that at the date stated, or at any time, said Fisher was received, as alleged, and deny that the said defendants at any time received the baggage or goods, as alleged, and deny that the same was the property of said Fish and plaintiffs, and deny that said goods consisted of merchandise in the manner and form —; and defendants deny that the plaintiffs, by the said Fisher, or otherwise, *was* the guest of defendants, and deny that defendants undertook, for compensation, as alleged, to safely keep in said inn any baggage

or merchandise, for sale by sample, as alleged, and deny that plaintiffs, by said Fisher, had with him upon entering the inn any baggage whatever, and deny that plaintiffs, by said Fisher, in any manner entrusted defendants with any baggage or goods, as
9 alleged, or left the same in defendants' charge or possession, as inn-keepers or otherwise, and deny that defendants or their servants at any time carelessly or negligently conducted themselves in regard to any baggage or goods, as alleged; deny that defendants received, as alleged, either of the items, or any part thereof, in said petition set forth, and deny that said articles, or any part thereof, were taken away from the room of said plaintiff, as alleged, by any one in manner and form stated, and deny that said articles of goods, or any part thereof, were or ever have been lost by plaintiffs, and deny said alleged articles were of the value alleged, or any value whatever; and defendants deny that the plaintiffs have suffered any damages in any sum whatever.

And these defendants say that at the several times of the several matters complained of in plaintiffs' petition the defendants did, as said inn-keepers, constantly have in their said inn an iron safe in good order and suitable for the safe custody of money, jewelry, and of articles of gold and silver manufacture and the like, and did keep a copy of chapter ninety-nine of the General Statutes of Missouri, as amended by an act of the General Assembly of said State of Missouri entitled "An act to amend section two (2) of chapter ninety-nine of the General Statutes of the State of Missouri, entitled 'Of innkeepers and their responsibility to their guests, approved April 1st, 1872,'"
10 and, as said statute then was printed by itself in large plain English type, framed and constantly and conspicuously suspended in the several places by said statutes required, and also a copy printed by itself in ordinary-sized plain English type posted upon the inside of every public sleeping-room of their inn, and that plaintiff did not offer to deliver at either of the times of the several matters complained any of said property alleged to have been lost by plaintiffs to defendants, as said inn-keepers, for custody in such iron safe, and that by force of the General Statutes of the State of Missouri, then and there in force, regarding inn-keepers and their responsibilities to their guests, the defendants were exempt from any and all liability because of any loss of said goods mentioned or any part thereof in any manner and form alleged.

And, further answering, these defendants say that said Fisher, whether acting for himself or for said plaintiffs, as a guest did not give written notice to defendants of having any merchandise, for sale or sample, belonging to plaintiffs in his or their possession after entering defendants' inn; and defendants say said alleged loss or losses of said plaintiffs was not caused by the theft of these defendants or their servants, and that because of said failure to give written notice, as required, defendants were exempt by law from any liability because of any loss of said goods mentioned or any part thereof in manner and form alleged.

And defendants ask to be hence dismissed with their costs in this behalf most wrongfully sustained.

NOBLE & ORRICK,
Attorneys for Defendant-.

11 And afterwards, to wit, on the 4th day of October, A. D. 1882, a replication was filed in words and figures following, to wit:

Replication.

In the Circuit Court of the United States, Eastern District of Missouri. September Term, A. D. 1882.

WM. M. FISHER *et al.*, Pl'ffs,
vs.
BENJAMIN STICKNEY and WILLIAM KELSEY, Def'ts.

Now come plaintiffs, and for replication to the new matter set up in defendant Benjamin Stickney's answer filed herein, answering, say that they deny each and every allegation therein.

J. B. WOODWARD,
J. M. & C. H. KRUM,
For Pl'ffs.

And afterwards, to wit, on the 7th day of April, 1883, the following proceedings were had and appear of record in said cause in words and figures following, to wit:

Verdict & Judgment.

WM. FISHER *et al.*
vs.
WM. KELSEY and BENJAMIN STICKNEY. } 2015.

Now again come the parties, by their attorneys, the plaintiffs by J. B. Woodward and J. M. & C. H. Krum, and the defendants by Noble and Orrick; and also come the jury herein as on yesterday, to wit, Thomas True, Isaac W. Williams, William H. Blaine, L. L. Prince, Aloah Culver, Robert Lieppold, Baxter Crawford, H. S. Platt, Eli Hillis, Mathias Riffle, Philip Lambert, and Samuel
12 Lane, who, after hearing the evidence and arguments of counsel and receiving the charge of the court, return the following verdict: " We, the jury, find for the defendants. H. S. Platt, foreman."

It is, therefore, considered by the court that the plaintiffs take nothing by their writ herein; that the defendants, William Kelsey and Benjamin Stickney, go hence without day and have and recover of said plaintiffs, Wm. M. Fisher and Thomas DuBois, their costs herein expended, and that a fee-bill or execution issue therefor.

And afterwards, to wit, on the 4th day of June, A. D. 1883, the following proceedings were had and appear of record in said cause in words and figures following, to wit:

Bill of Exceptions Approved.

WM. M. FISHER *et al.* } 2015.
vs.
WM. KELSEY *et al.* }

Now come the parties, by their attorneys, and the court having considered the plaintiffs' motion for a new trial, heretofore filed, orders that said motion be overruled; and thereupon the said defendants present to the court their bill of exceptions, approved and signed by the Honorable George W. McCrary, circuit judge, which said bill of exceptions is ordered to be filed and made part of the record herein.

Bill of Exceptions.

Circuit Court of the United States, Eastern District of Missouri.

WM. M. FISHER *et al. vs.* WM. KELSEY *et al.*

13 Be it remembered that on the trial of this cause the plaintiffs gave evidence tending to prove their copartnership, and the kind, description, and value of the goods as mentioned in their petition.

Plaintiffs also gave evidence tending to prove that they were engaged in the manufacturing and selling of jewelry, such as is described in their petition, at Providence, Rhode Island, and had been so engaged for about thirty years; that William M. Fisher, senior partner, had been traveling salesman for the firm for many years, exposing for sale and selling their goods throughout the country during said time.

WILLIAM M. FISHER testified by question and answer as follows:

Q. How long have you known the defendants in this case?

A. I think I stopped in Mr. Kelsey's house, in Columbus, Ohio, in 1853 or 1854. He was then keeping the American Hotel.

Q. Did you ever afterwards know him here in this city?

A. I did.

Q. When did you first know him here in St. Louis?

A. When he first came here.

Q. Well, the jury want to know when that was.

A. It was prior to 1874, certainly.

Q. Well, what was he doing?

A. He was one of the proprietors of the Planters' House.

Q. Had you before that—1873—been at the Planters' House while engaged in the business you have mentioned?

A. I have frequently.

Q. How often?

A. On an average of about once a month.

14 Q. What conveniences were usually given you by the proprietor of the hotel (Planters' House) when you went there?

A. After arriving—generally in the morning—while I was at

breakfast he would have the room put in the usual condition for traveling men.

Q. Well, what is that?

A. They would put in one or two sample tables they had made for that purpose, and when I came from my breakfast then they ordered my trunk in there.

Q. Now, do you remember what time it was when you came here in 1878?

A. I came down from Chicago on the night train, arriving here about eight o'clock in the morning—Sunday.

Q. Where did you go?

A. I went direct to the Planters' House.

Q. What room was assigned to you?

A. Room No. 3. I think it was on the south side of the passage, on the south side of the office.

Q. On the first floor?

A. On the first floor.

Q. Is that a tiled floor?

A. Yes, sir.

Q. What was put in that room there?

A. Two sample tables in the morning and after breakfast my baggage.

Q. Do you know whether Mr. Kelsey knew of your coming at that time?

A. Do you mean when I arrived there that morning?

Q. Yes, sir.

A. I don't think he did.

Q. Did he during the day?

A. He did.

15 Q. State how he knew.

A. By the usual notice which I am always in the habit of sending to a hotel, and which arrived after I got to the house; it came along in the forenoon between eleven and twelve o'clock, and I saw it delivered to him immediately after that time—after the arrival of the card that I sent there.

Q. When did you mail it?

A. It came into the hotel.

Q. Where did you mail it?

A. From Chicago, addressed to the "Planters' House," St. Louis.

Q. Did you see it after you came here?

A. I saw it after it came here; it didn't come down on Friday night; it came down on Saturday night, and it was delivered in the morning between 11 and 12 o'clock.

Q. Did he make any remark about it?

A. He made a laughing remark; said it was rather late notice for me, if I wanted a room, four or five hours after I had been in the hotel.

Q. Did he make any objections to your being in the house?

A. He did not, sir; he treated me with the greatest civility always.

Q. Had your baggage been put in this room No. 3, do you know, before you saw that card in his hands?

A. It had.

Q. Can you describe whether there was anything done with the card?

A. It was our usual printed card; I saw Mr. Hilsey throw it into the waste-basket, as usual.

16 I want you to look at this blank card. (Shows card to witness.)

A. That is our usual postal card with our business printed on it, which I have been in the habit of sending out; our business is printed on the top of the card and on the reverse side.

Q. State who it was addressed to before you read it.

Gen. NOBLE, of counsel for defendant-: Do you propose to show secondary evidence in regard to the contents of the card?

Judge KRUM: Yes, sir; it was addressed to the "Planters' House, St. Louis."

A. Yes, sir; with a notice for a room on the other side, of course.

The printed part was then read in evidence as follows: "William M. Fisher & Co., manufacturers of gold and silver chains, &c., 2608 Eddie street, Providence, Rhode Island; post-office box, 682."

Q. That, I understand you, was addressed to the Planters' House, St. Louis, Mo.?

A. It was; or this is a duplicate of one that was sent.

Q. Was there anything on the other side?

A. On the other side was an order for a room, May 12th, in the Planters' House.

Q. How long did you occupy the first room assigned you, room No. 3 of the Planters' House?

A. From the morning I went there, somewhere between eight and nine o'clock, during the day, until six or seven o'clock in the evening of that Sunday.

Q. Well, then, what was done?

A. During the day, Sunday——

Q. That is, did you change?

17 A. About seven o'clock on Sunday evening one of the clerks of the hotel (I think his name was Cunningham) called me in the office and wanted to know if I would change from room No. 3 to room No. 9, giving as an excuse that they wished to paint room No. 3 on Monday morning, and that No. 9 had been fixed up before. My answer was as formerly to No. 9. I told him he knew I never liked that room, for the reason that it had sliding doors—that there were sliding doors between No. 9 and No. 10. His remarks were that it was perfectly safe; that the bolts were all right; that there was always a watchman on that floor, and there was a sample man in the next room. Among traveling men it is the general understanding that a traveling man will take care of his room and protect his door into the hall there and he wanted me to go into it.

Q. Go on and state what was done after that.

A. Mr. Cunningham replied that it was perfectly safe, and Mr. West, the watchman, was always there, and that the doors were properly fastened, &c. As I was going out to make a call I gave him my key, with a door-guard attached to it, which fastens the door into the hall—similar, in fact, to the one I have in my pocket. I guess it is the same one. However, I told him to go to room No. 3 and remove the baggage into the other room and put the guard into the door of No. 9, where he was to remove the baggage. The porter, Mike, was not there at the time. He said he would do it, and then I went out to make a call. When I returned I found the baggage was removed to No. 9, but on going there I found he had not placed the door-guard in the door, as I had told him to do.

18

Q. When you were removed into No. 9 what accommodations for your business did the defendant- furnish in that room?

A. They had placed in there two tables covered with sheets for the purpose of showing goods on them.

Q. Describe how they were made.

A. They were boards, perhaps ten feet long, laid on horse-blocks. They were planed boards, and altogether were about three feet wide. The hotel keeps a certain quantity on hand.

Q. Were those same tables in No. 3?

A. I think they were, and removed from one room to the other. I think there was one added to put into No. 9.

Q. Had No. 3 and sliding doors on either side?

A. It had not, It was what we call a solid room.

Q. Do you know what the customary price was per day in the hotel per room?

A. Do you mean for traveling men? I think the house was being run at about three dollars per day; two dollars and a half in some places.

Q. The best rooms were about three dollars?

A. Yes, sir.

Q. What were you charged per day?

A. It was three and a half or four dollars. I could not say positively at the present time; not less than three and a half.

19

Q. Have you got the bill?

A. I have not got it; I think it is here, however.

Q. I mean the bill you paid on that occasion. (Here a paper was shown witness.)

WITNESS: Seven & three-fourths days, $27.

Q. Is that the bill—a bill of $31.75—is that the bill?

A. That is the bill I paid when I left there on May 19th, on the Sunday evening afterwards—board, $27; washing, $1, and there are some other things there.

Q. What is that a day—$27?

A. I think it was seven and three-fourths days; I think it would be about $3.75 a day; I can figure it up; I had some other things there and they mixed the things up.

Q. I am speaking merely of the board?

A. That is the board.

Q. Now, in the business you were engaged in then as traveler, you were representing your firm, were you not, also?

A. I was.

Q. Now, what was necessary for you to have with you in order for you to prosecute your work?

Objected to by counsel for defendants as immaterial.

The court overruled the objection, and counsel for defendants then and there excepted to the ruling of the court.

Q. What was it necessary for you to have in order for you to carry on your traveling business?

A. It was necessary for me to have my stock.

20 Q. Now, how much did you carry—you have been at the business a great number of years—what did you usually carry?

Objected to by counsel for defendants as irrelevant.

The court overruled the objection, and counsel for defendants then and there duly excepted to the ruling of the court.

A. What had I carried previously?

Q. Yes, sir.

A. I did not carry the same amounts at all times, but I have often brought $40,000 worth of goods at retail.

Q. To the Planters' House?

A. Yes, sir.

Q. Now, what was it usual for you to carry for three or four years previous to that time?

A. At that time I had perhaps $21,000 or $22,000 worth.

Q. You had sold quite a lot?

A. I was not carrying then quite as large a stock as I formerly did.

Q. I think you stated to whom this property belonged?

A. I did.

Q. To the plaintiffs?

A. To the plaintiffs.

Objected to by counsel for defendants as incompetent and irrelevant.

The COURT: I suppose the question strictly would be whether it belonged to the firm or to the surviving partners.

Q. Did it belong to the firm—the property in your possession?

A. The property belonged to the firm.

Q. And in your possession when you went in there?

21 A. Yes, sir.

Q. When you were stopping at the Planters' House was Mr. Kelsey in your room while you were stopping there? If so, how often?

A. He was frequently in my room- when I was stopping there.

Q. How recently, the last time you were there, was it he was in your room before this occurrence?

A. He was in my room on Monday, the 13th.

Q. And say your goods?

A. The goods were open at the time.

On cross-examination this witness gave the following testimony tending to show that the theft complained of had been perpetrated by a man by name [of] Billy O'Brien, a reputed burglar, who was described by the witness, and who was supposed by him to have slipped into the room, and who was not a servant of the defendants.

The following question being put to the witness—

Q. Did you state formerly when you attempted to force the door open that Billy O'Brien had opened by force you found it stuck?

The answer was:

A. He had found it open or he never could have got in there.

Q. Did you state that?

The witness answered: I think I did.

The witness also gave the following testimony:

"There was a hole through the doors, or where some came in or went out.

Q. Do you remember finding a newspaper there?

A. I do not.

22 Q. Don't you remember swearing before that you did?

A. I don't think I swore I did. I think I swore there was one found.

Q. Well, you saw it?

A. I did.

Q. Do you remember what paper it was?

A. I think it was the Chicago Times; I am not positive.

Q. Do you remember what you said as to how it looked from the "folding"—whether a "jimmy" had been in it, or something of that sort?

A. There was an impression on the paper, and by the appearance of the paper it had had a "jimmy" in it.

Q. Well, you did find a paper there?

A. There was one found.

Q. And you saw it?

A. I saw it.

Q. It was talked about at the time?

A. It was.

Q. Well, you stated then and you state now that it had been folded with a jimmy in it?

A. Yes, sir.

Q. Did you ever know Billy O'Brien?

A. Only inferentially. I never saw the man. There was a man shot, betweon Dearborn and Clark streets, in Chicago, afterwards, later in November—shot dead—and I was told it [was] him.

Q. You knew him by reputation at the time?

A. No, sir; I did not know him by reputation at the time; I afterwards heard his name.

23 Q. When you said "Billy O'Brien was his name," you referred to a small man representing that individual?

A. He was a smaller man than I was.

Q. He was a burglar, and had the reputation of being a man that could go through a very small space?

A. He was the man, I was told by a detective, — was seen by a man to enter the room.

Q. You swore in the case before, did you, as I have quoted, that his name was Billy O'Brien?

A. I presume I did.

This witness further gave the testimony by question and answer as follows:

Q. Now, you state that this postal card had on it certain printed matters. Don't you remember that it had on it certain written matter?

A. Yes, sir.

Q. Did it state on its back anything more in writing—on the one side where the direction of the postal card is put—than "Planter's House, St. Louis, Missouri?"

A. I think that was all it said on one side.

Q. And on the other, "Planters' House, May 12th, William M. Fisher?"

A. I wouldn't swear whether that was on the other side or not.

Q. Well, I wrote it.

A. It was the usual order for a room.

Q. Don't you remember you swore before to just exactly what it did contain; do you remember whether it did or not?

A. I do not.

24 Q. Did you say it did contain anything more than what I have just stated—Planters' House, May 12, William M. Fisher?

A. I wouldn't say positively whether it contained anything more or not, but I will swear it contained an order for a room on that side in language that was received by all hotels where I have engaged room- of hotels.

Q. Now, I want you to give me the language you wrote on that paper, if you can—on that postal card—will you?

A. I don't think I could do it four years afterwards—nearly five.

Q. Was your memory in regard to that better when you were examined before than it is now?

A. I- may have been, two years nearer the time; my memory is very good.

Q. Don't you remember in your cross-examination before that you stated that there was on that postal card on one side "Planters' House, St. Louis, Missouri," and on the other side, Planters' House, May 12th, William M. Fisher?

A. That would be a very usual notice for me to send to a hotel;

I presume it would be correct; I am in the habit of sending an order for a room.

Q. Was that all or anything more?

A. It was very selden there was anything more.

Plaintiff then rested.

Counsel for defendants offered in evidence the two papers referred to heretofore, and shown to the witnesses, headed "Planters' House," as follows:

24*a* J. H. DUNDAS. EXHIBIT "A."

Planters' House.

An act concerning the liabilities of innkeepers.

Be it enacted by the General Assembly of the State of Missouri as follows:

SECTION 1. No innkeeper in this State, who shall constantly have in his inn an iron safe, in good order, and suitable for the safe custody of money, jewelry, and articles of gold or silver manufacture and of the like, and who shall keep a copy of this act printed by itself, in large, plain English type, and framed, constantly and conspicuously suspended in the office, bar-room, saloon, reading, sitting, and parlor room of his inn, and also a copy printed by itself in ordinary size plain English type posted upon the inside of the entrance door of every public sleeping-room of his inn, shall be liable for the loss of any such articles aforesaid suffered by any guest unless such guest shall have first offered to deliver such property lost by him to such innkeeper for custody in such iron safe, and such innkeeper shall have refused or omitted to take it and deposit it in such safe for its custody, and to give such guest a receipt therefor.

SECTION 2. (Amended April 1st, 1872.)

SEC. 3. The act entitled "An act to regulate inns and taverns," approved March eighteenth, eighteen hundred and forty-five, and all acts amendatory of the same, are hereby repealed.

This act shall take effect and be in force from and after its passage.

Approved December 5th, 1855.

An act to amend section two (2) of chapter ninety-nine (99) of the General Statutes of the State of Missouri, entitled "An act of innkeepers and their responsibility to their guests."

Be it enacted by the General Assembly of the State of Missouri as follows:

SECTION 1. Section two (2) of chapter (99) of the General Statutes of Missouri is hereby amended so as to read as follows: "No innkeeper in this State shall be liable for the loss of any baggage or other property of a guest caused by fire not intentionally produced by the innkeeper or his servants; nor shall he be liable for the loss of any merchandise for sale or sample belonging to a guest, unless

the guest shall have given written notice of having such merchandise for sale or sample in his possession after entering the inn, nor shall the innkeeper be compelled to receive such guest with merchandise for sale or sample. But innkeepers shall be liable for the losses of their guests caused by the theft of such innkeeper, or his servants, anything herein to the contrary notwithstanding.

SEC. 2. This act shall take effect and be in force from and after its passage.

Approved April 1st, 1872.

KELSEY & STICKNEY, *Proprietors.*

Exhibit A shown to Seeburger.—L. L. W.

[Endorsed:] 1416. U. S. circuit court. W. M. Fisher *et al. vs.* William Kelsey *et al.* Deposition of Wm. F. Sperry, for defendants, not to be opened but in presence of the court. To the clerk of the U. S. circuit court, eastern district of Missouri. Filed May 9, 1879. M. M. Price, clerk.

24*b* J. H. DUNDAS. EXHIBIT "B."

Planters' House.

An act concerning the liabilities of innkeepers.

Be it enacted by the General Assembly of the State of Missouri as follows:

SECTION 1. No innkeeper in this State, who shall constantly have in his inn an iron safe in good order and suitable for the safe custody of money, jewelry, and articles of gold or silver manufacture and of the like, and who shall keep a copy of this act printed by itself in large, plain English type, and framed, constantly and conspicuously suspended in the office, bar-room, saloon, reading, sitting, and parlor room of his inn, and also a copy printed by itself in ordinary size plain English type posted upon the inside of the entrance door of every public sleeping-room of his inn, shall be liable for the loss of any such articles aforesaid suffered by any guest unless such guest shall have first offered to deliver such property lost by him to such innkeeper for custody in such iron safe and such innkeeper shall have refused or omitted to take it and deposit it in such safe for its custody and to give such guest a receipt therefor.

SECTION 2. (Amended April 1st, 1872.)

SECTION 3. The act entitled "An act to regulate inns and taverns," approved March eighteenth, eighteen hundred and forty-five, and all acts amendatory of the same are hereby repealed.

This act shall take effect and be in force from and after its passage.

Approved December 5th, 1855.

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SEC. 2. This act shall take effect and be in force from and after its passage.

Approved April 1st, 1872.

KELSEY & STICKNEY, *Proprietors.*

Exhibit B shown to Seeburger.—L. L. W.

25 Wm. M. Fisher & Co., manufacturers of gold and silver chain & chain trimmings, 226 Eddy street, Providence, R. I. P. O. box 622, where all orders should be addressed. New York office: 13 John street.

PROVIDENCE, R. I., ——, 188–.

Yours respectfully, WM. M. FISHER & CO.

26 Objected to by counsel for plaintiffs as incompetent, because they did not fully comply with the requirements of the statutes.

The Court overruled the objection, and counsel for plaintiffs then and there excepted to the ruling of the court.

Counsel for plaintiffs then objected to the smallest paper of the two, because it was not in the ordinary plain English type, and offered to prove that it was not in "ordinary plain English type."

The court overruled the objection and refused to allow plaintiffs to prove that it was not in "ordinary plain English type."

Counsel for plaintiffs then and there excepted to the ruling of the court.

The papers were then read in evidence.

Defendant also introduced testimony, by William Kelsey, a de-

fendant and a witness in his own behalf, tending to prove that he did not know what goods or effects the plaintiff had at the time when he came to the inn, and that the defendants did not see nor learn what amount of goods he had, neither of them having gone into Fisher's room before Fisher came to Mr. Kelsey and told him the room had been entered by a burglar, and *as* testimony tending to show that plaintiff's alleged loss was not caused by the theft of defendants or defendants' servants, *or defendants' servants;* also by William H. Cunningham, a witness for defendants, testimony tending to show that Fisher had on previous occasions occupied No. 9, and that witness did not urge Fisher to change to that room, nor give
27 him any assurance that the room was safe, as testified by Fisher.

This was all the evidence offered or heard in the cause.

His Honor Judge McCrary said:

Gentlemen, the act of 1872 brings in an entirely new element. Previous acts required the posting up of these notices in the public rooms and sleeping-rooms of a hotel, but there was nothing in these acts prior to 1872 that applied to the case of a traveling merchant, or of a man going about the country with merchandise for sale, and who came into a hotel with this merchandise and there engaged in the business of selling the merchandise itself or selling by sample.

We all know that this mode of disposing of merchandise has of late years become a great business. I suppose that a very large proportion of the selling of merchandise of all descriptions is now done by this method of sending agents through the country, who carry with them samples of the goods they propose to sell, or in some cases carry the goods which they propose to sell, where the articles are not too cumbersome.

When it is convenient for them to do so they will carry the articles themselves; otherwise they carry samples and sell by sample.

Now, it is very evident that the liabilities and responsibilities of innkeepers would be very great indeed if they are held liable for all the goods under this system of transacting commercial business that are brought into the hotel. Whether they would be liable—whether innkeepers would be liable at common law in such
28 a case as this—is, to mind, a very doubtful question. I have always understood that the liability of an innkeeper was substantially that of a common carrier. It extends to the ordinary baggage that a trader traveler with him.

Of course what is baggage is a question depending very much upon circumstances, the condition of the person who is traveling, his station in life, and all that, but I have never understood that the liabilities of a- innkeeper could be carried at common law so as to make him responsible for merchandise a traveler brings in his room at the hotel for purposes of trade and traffic.

That may be the law; I will not say it is not, because it does not arise now; but if it be the law, or be the common law, it is perfectly apparent that the Legislature of Missouri has undertaken to change

it, and has done so, by this act of 1872, which, as I have said, is an independent thing, a new provision, not a mere modification or change of any of the provisions of the old statute, but a new regulation, applying to a different state of things.

It declares that no innkeeper in this State shall be liable for the loss of any baggage or other property of a guest caused by fire not intentionally introduced by the innkeeper or his servants. That has nothing to do, of course, with this case, but it serves to show that the Legislature introduced into the laws on this subject a new and independent provision: "Nor shall he be liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such articles
29 for sale after entering the inn; nor shall the innkeeper be compelled to receive such guest with merchandise for sale or sample. But innkeepers shall be liable for losses of their guests caused by the theft of such innkeeper or his servants, anything herein to the contrary notwithstanding."

Now, if I understand the force and effect of that statute, it is that the traveler who comes to a hotel with merchandise for sale or sample and goes into a room in a hotel for the purpose of exhibiting and dealing in it must give to the innkeeper written notice that he has that property with him in order to make the innkeeper liable for it. That being so, there being no evidence here at all tending to show that any such written notice was given, that is the end of this case.

We are asked to say that the statute does not require written notice. The court could not say that. It is not for the court to say what the purpose of the Legislature may have been, but it is fair to presume that its intention was to have the evidence of such notice in such shape that it could not admit of any question of doubt. The reason for it, I think, is tolerably apparent. While the innkeeper may in some cases know what his guest was, as a general rule he will not know. He may know that he has merchandise, but may not know what it is; he may not know what its character or quality is; he may not know that he has merchandise at all, and very great difficulties would arise as a matter of course if it was left a question whether he had notice of any kind.

30 But whatever the reason may have been the Legislature has said very plainly that it must be written notice, and even if this was to be construed as a statute in contravention of the common law, and, therefore, to be strictly construed, we cannot construe it by striking out anything in it; it must be read as it stands with regard to the question whether there is any evidence of waiver here that ought to go to the jury. I have no difficulty at all upon that subject.

The innkeeper under the act waives nothing, because he knows that the guest has merchandise. He knows that he has merchandise, but he also knows that if the guest intends to hold him liable he must give him the written notice.

The innkeeper waives nothing if he does not fail to do his duty under the act.

If he observes his obligation, as prescribed by the act, it certainly cannot be held that he has waived anything.

This is an interesting and important case, and I apprehend that the parties will want to have the question settled by the Supreme Court, and I shall be very glad to have you do so, but, with the view I hold, I must give the instructions that are usual. Therefore, I give the following:

Charge to the Jury.

The court instructs the jury, at the time in the petition mentioned as that at which the matters complained of are stated to have occurred, no innkeeper in the State of Missouri was liable for the loss of any merchandise, for sale or sample, belonging to a guest, unless the guest should have given written notice of having such mer-
31 chandise for sale or sample in his possession after entering the inn, unless the loss of the guest was caused by the theft of the innkeeper or his servants, and inasmuch as the evidence here shows that these goods were kept in the hotel for sale or sample, and there is no evidence tending to show that there was any such written notice as the statute requires and no evidence tending to show that the theft was caused by the innkeeper or his servants, it follows that you must return a verdict for the defendant, and this you can do without leaving your seats.

To the giving of this charge to the jury the plaintiffs at the time duly excepted.

The plaintiffs asked the court to charge the jury as follows:

The court is asked to charge the jury that if they believe from the evidence that the defendants in this case, at the time they received the plaintiff, Wm. M. Fisher, and his goods, as a guest in their inn, *they* had knowledge and information that he had in his trunk goods and merchandise, for sample and sale, of the kind and character spoken of by the witnesses, and if the jury further find from the evidence that the defendants, notwithstanding they had such knowledge, accepted said Fisher, with his goods and merchandise, as a guest and assigned and gave him a room in their inn usually occupied by commercial travelers, having such goods for sale and sample, and furnished said Fisher such things and conveniences, in the said room so assigned to him, for the use and convenience
32 of his trade; and if the jury further find from the evidence that the defendants did not after they knew or had knowledge that said Fisher had such property in his possession, for sample and sale aforesaid, refuse to receive him as a guest, with his property, in said inn, then the jury may find that the defendants waived the requirements of written notice mentioned in the act approved April 1st, 1872.

The court refused to give the charge aforesaid asked by the plaintiffs, and then duly excepted to the ruling of the court.

After verdict, and in proper time, plaintiffs filed their motion for a new trial as follows:

Motion for New Trial.

WILLIAM M. FISHER *et al.*
vs.
WILLIAM KELSEY *et al.* } 2015.

And now comes the plaintiffs in the above-entitled cause and moves the court for a new trial herein on the grounds and for reasons following:

First. Because the court erred in admitting illegal & incompetent evidence offered by defendants and objected to at the time by plaintiffs.

Second. Because the court erred in its charge to the jury given at the instance and request of the defendants.

Third. Because the court erred in refusing to charge the jury on the point, & as requested by plaintiffs, in writing.

Fourth. Because the verdict of the jury was given for defendants by the positive and express direction of the court, without consideration by the jury [of] any of the evidence in the case.

33 Fifth. Because the verdict is against the evidence and against the law in the case.

Sixth. Because the verdict is for defendants, whereas it should have been for plaintiff-.

J. B. WOODWARD,
J. M. & C. H. KRUM,
Att'ys for Pl'ff-.

Which the court overruled and refused a new trial; to which ruling of the court the plaintiffs duly excepted.

And now, that all the matters aforesaid may become of record, the plaintiffs tender this their bill of exceptions, and pray that the same may be signed and made of record, which is accordingly done.

GEO. W. McCRARY,
Circuit Judge.

Approved.

NOBLE & ORRICK,
Atty's for Def'ts.
J. B. WOODWARD,
J. M. & C. H. KRUM,
Att'ys for Pl'ffs.

And afterwards, to wit, on the 6th day of June, 1883, the following proceedings were had and appear of record in said cause:

Writ of Error Allowed.

WILLIAM M. FISHER *et al.*
vs.
WILLIAM KELSEY *et al.* } 2015.

Now come the plaintiffs, by attorney, and present to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonising the said de-

fendants to be and appear at a Supreme Court of the United
34 States, at the next term thereof, to be begun and holden at Washington, D. C., on the second Monday of October next, which said writ of error is allowed and said citation signed by the judge. And the said plaintiffs also present to the court their bond in the penal sum of two hundred and fifty dollars, which is approved and ordered to be filed as a part of the record herein.

Said bond is in words and figures following, to wit:

35 *Bond.*

Know all men by these presents that we, William M. Fisher & Thomas D. Witt, are held and firmly bound unto William Kelsey & Benjamin Stickney in the full and just sum of two hundred & fifty dollars, to be paid to the said William Kelsey & Benjamin Stickney, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately, at the March term, 1883, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between William M. Fisher *et al.*, plaintiffs, and William Kelsey & Benjamin Stickney, *are* defendants, judgment was rendered against the said plaintiffs for costs, and the said plaintiffs having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiffs shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make good their said plea, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM M. FISHER. [SEAL.]
THOS. D. WITT. [SEAL.]

Sealed and delivered in presence of—
JOHN GREAVES.
JOHN M. KRUM.

Approved by—
SAMUEL TREAT, *Judge.*

[Endorsed:] No. 2015. United States circuit court, eastern district of Missouri. Wm. M. Fisher *et al. vs.* Wm. Kelsey *et al.* Bond, $250.00. —— ——, principal. —— ——, sureties. Filed 5th day of Ap'l, 1883. A. P. Selby, clerk.

36 UNITED STATES OF AMERICA, } ss.
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the proceedings and records in case No. 2015 of William M. Fisher *et al.*, plaintiffs, against William Kelsey *et al.*, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 7th day of September, in the year of our Lord eighteen hundred and eighty-three.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of Said Court,
By F. E. McCRARY, *Deputy.*

[Endorsed:] No. 2015. United States circuit court, eastern district of Missouri. Wm. M. Fisher and Thomas DuBois against William Kelsey and Benjamin Stickney. Duly-certified transcript in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 173. William M. Fisher and Thomas DuBois, plaintiffs in error, *vs.* Ezra Kelsey and Henry A. Lanman, executors of William Kelsey, deceased, and Benjamin Stickney. Filed 15th October, 1883.

121-383

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FILED
DEC 8 1886
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1886.

No. 178.

WILLIAM M. FISHER AND THOMAS DUBOIS,
Plaintiffs in Error,

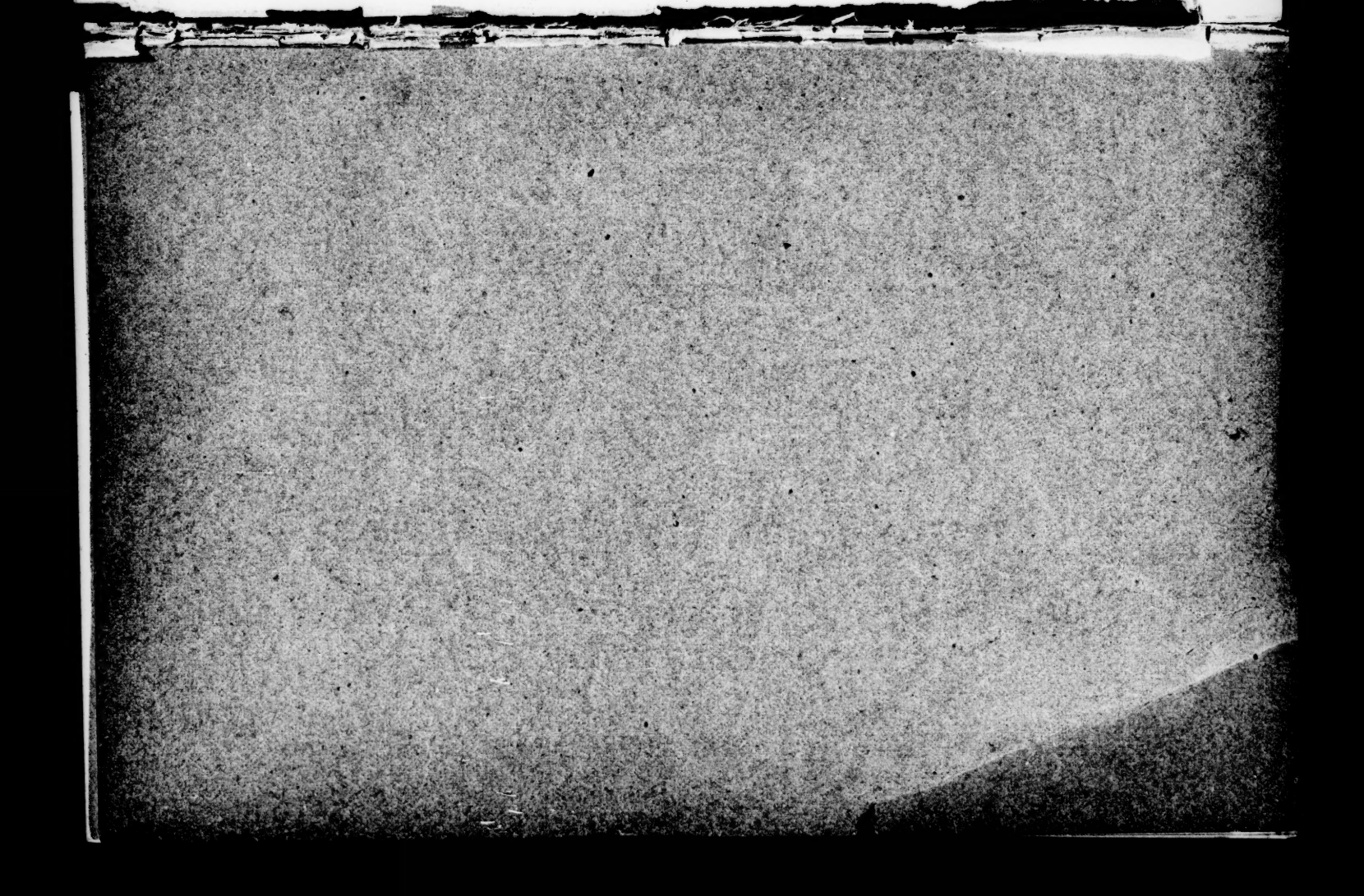
vs.

EZRA KELSEY AND HENRY A. LANMAN, EXECUTORS OF WILLIAM KELSEY, DECEASED, AND BENJAMIN STICKNEY,
Defendants in Error.

STATEMENT, BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

CHESTER H. KRUM,
For Plaintiffs in Error.

LEVISON & BLYTHE STATIONERY CO. PRINT, ST. LOUIS.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1886.

No. 178.

WILLIAM M. FISHER AND THOMAS DUBOIS,
Plaintiffs in Error,

vs.

EZRA KELSEY AND HENRY A. LANMAN, Executors of William Kelsey, Deceased, and Benjamin Stickney,
Defendants in Error.

STATEMENT OF PLAINTIFFS IN ERROR.

This is an action brought to the September Term, 1882, of the Circuit Court of the United States for the Eastern District of Missouri. The plaintiffs in error sue to recover the value of certain jewelry, stolen from a room occupied by a traveling member of their firm, in a hotel then kept by William Kelsey and Benjamin Stickney, in the city of St. Louis. The petition alleges, that at

the date of the loss, Kelsey and Stickney were the keepers of a common inn in the city of St. Louis; that the plaintiffs in error were engaged in the business of manufacturing and selling gold chains and chain trimmings and ornaments; that in selling these goods, it was necessary, and the practice of the plaintiffs in error, for one of their firm, William M. Fisher, as traveling salesman, to carry with him articles of their manufacture, in trunks and valises; that on May 12th, 1878, having in his possession, and contained in his baggage, the property sued for, the said William M. Fisher was received as a guest by Kelsey and Stickney in their capacity as innkeepers, and that having so received said Fisher as a guest, and the baggage of said Fisher having been committed to their care and custody, Kelsey and Stickney carelessly and negligently permitted the property sued for to be taken from the room occupied by the plaintiff in error, by some unknown person, thereby causing the total loss of said property to the plaintiffs in error.

The answer of the defendants admitted that they were innkeepers, but denied the other material allegations of the petition. The answer set up special defenses based upon the following provisions of the General Statutes of Missouri:

SECTION 5785. "No innkeeper in this State, who shall constantly have in his inn an iron safe, in good order, and suitable for the safe custody of money, jewelry, and other articles of gold or silver manufacture and of the like, and who shall keep a copy of this act, printed by itself, in large, plain English type, and framed, constantly and conspicuously suspended in the office, bar-room, saloon, reading, sitting, and parlor room of his inn, and also a copy, printed by itself, in ordinary size plain English type, posted upon the inside of the entrance door of every public sleeping-room of his inn, shall be liable for the loss of any such articles aforesaid, suffered by any guest, unless such guest shall have first offered to deliver such property lost by him to such innkeeper for custody in such

iron safe, and such innkeeper shall have refused or omitted to take it and deposit it in such safe for its custody, and to give such guest a receipt therefor."

SECTION 5786. "No innkeeper in this State shall be liable for the loss of any baggage or other property of a guest caused by fire not intentionally produced by the innkeeper or his servants; nor shall he be liable for the loss of any merchandise, for sale or sample, belonging to a guest, unless the guest shall have given written notice of having such merchandise, for sale or sample, in his possession after entering the inn, nor shall the innkeeper be compelled to receive such guest with merchandise, for sale or sample. But innkeepers shall be liable for the losses of their guests caused by the theft of such innkeeper, or his servants, anything herein to the contrary notwithstanding."

The answer alleged compliance with the provisions of the first section on the part of the defendants, and a failure on the part of the plaintiffs in error to give the written notice required by the last section. To the affirmative portions of the answer there was a reply.

At the trial, which was by jury, the plaintiffs in error introduced evidence tending to prove their co-partnership and the kind, description and value of the goods described in the petition. They also introduced evidence tending to prove that the plaintiff in error, William M. Fisher, had been a traveling salesman for the firm for a period of about thirty years. They also introduced evidence showing that it was necessary for the purposes of the business of the plaintiffs in error to carry, as samples, such a large number of valuable articles.

William M. Fisher testified that Kelsey, one of the defendants, was in his room before the robbery was committed and the goods, carried as samples, were then open. This testimony was disputed by the evidence of Kelsey himself.

Evidence was also introduced tending to show that the goods sued for were stolen by one Billy O'Brien, who was not in the employ of the hotel proprietors. There

was no evidence, in the case, that the written notice required by the statute was given by the plaintiffs in error.

Upon the conclusion of the evidence the Court was asked by the plaintiffs in error to charge the jury as follows:

"The court is asked to charge the jury that if they believe from the evidence that the defendants in this case, at the time they received the plaintiff, Wm. M. Fisher, and his goods, as a guest in their inn, had knowledge and information that he had in his trunk goods and merchandise, for sample and sale, of the kind and character spoken of by the witnesses, and if the jury further find from the evidence that the defendants, notwithstanding they had such knowledge, accepted said Fisher, with his goods and merchandise, as a guest, and assigned and gave him a room in their inn usually occupied by commercial travelers, having such goods for sale and sample, and furnished said Fisher such things and conveniences, in the said room so assigned to him, for the use and convenience of his trade; and if the jury further find from the evidence that the defendants did not, after they knew or had knowledge that said Fisher had such property in his possession, for sample and sale aforesaid, refuse to receive him as a guest, with his property, in said inn, then the jury may find that the defendants waived the requirements of written notice mentioned in the act approved April 1st, 1872."

But the Court refused to so charge the jury and the plaintiffs in error duly excepted.

Thereupon the Court gave the following charge, to which plaintiffs in error duly excepted.

"The court instructs the jury, at the time in the petition mentioned as that at which the matters complained of are stated to have occurred, no innkeeper in the State of Missouri was liable for the loss of any merchandise, for sale or sample, belonging to a guest, unless the guest should have given written notice of having such merchandise for sale or sample, in his possession after entering the inn, unless the loss of the guest was caused by the theft of the innkeeper or his servants, and inasmuch as the evidence here shows that these goods were kept in the hotel for sale or sample, and there is no evidence tending to show that there was any such written notice as the statute requires, and no evidence tending to show that the theft was caused by the innkeeper or his servants, it follows that you must return a verdict for the defendant, and this you can do without leaving your seats."

The jury accordingly returned a verdict for the defendants, and after motion for new trial, which was overruled, the plaintiffs in error sued out their writ of error, on which the case now comes to this Court.

ASSIGNMENT OF ERROR.

The plaintiffs in error assign as error upon the record the refusal of the Court to charge the jury as requested by such plaintiffs in error, and the direction to the jury by the Court to return a verdict for the defendants.

The plaintiffs in error also assign as error, the refusal of the Court to allow plaintiffs to introduce evidence tending to show that the notice relied on by the defendants was not printed in "large, plain English type."

BRIEF.

I.

Prevailing authorities make innkeepers insurers of the property committed to their care, against everything but the act of God, or the public enemy, or the neglect or fraud of the owner of the property.

II.

Such being the state of the law, in the absence of the statute upon which they rely, the record clearly establishes a liability on the part of the defendants in error.

a. The evidence on part of plaintiffs in error shows that Kelsey, one of the proprietors, knew the nature of the goods brought to the hotel by Fisher. He suffered them to remain without objection.

b. No objection to reception of goods having been made by the proprietors, it is not material whether the goods lost were baggage, within the legal meaning of the term, or whether they were only merchandise. By suffering them to remain in the hotel, after knowledge of their nature, proprietor comes within rule of
Swift vs. R. R. Co., 12 Wall. 262.

c. Goods were stolen while in room assigned to Fisher by the proprietors.

Had there been no statute covering the case, it would have been allowed to go to the jury.

III.

There is nothing in the situation under the statute which renders inapplicable general doctrines with reference to waiver.

a. Had the statute defined meaning of term, "baggage," and provided that innkeeper should not be liable for loss of property other than such baggage, surely an innkeeper who knowingly received a guest with property other than baggage would be liable for its loss, unless within common law exceptions.

Swift vs. R. R., Supra.

b. The statute is to be construed with reference to the intention of the legislature. The object of the statute is merely to give notice to innkeeper as to the nature of the property. Where he has personal knowledge the purpose of the statute is satisfied.

Purvis vs. Coleman, 21 N. Y. 111.

c. The doctrine, that party may waive right created in his favor by statute, is too well settled to need citation of authorities.

ARGUMENT.

The question upon this writ of error is, whether in the light of the testimony, the Court below ought to have left the jury to decide whether the defendants waived the provision of the Statute in regard to written notice.

The Statute was enacted for the protection of innkeepers. It entitles them to notice of the fact that a guest has with him articles of merchandise for sale, or sample. Not only does the Statute provide for such notice, but it also provides, that an innkeeper shall not be compelled to receive a guest, with merchandise for sale, or sample. To say, that circumstances may not indicate a waiver of the provisions of this Statute is to depart widely from all settled notions concerning similar Statutes.

The Statute restricts the liability of the landlord, or innkeeper within limits unknown to the common law. In the absence of such a Statute, there could be no doubt as to the liability of the defendants in error. They received Fisher as their guest. They so received him with knowledge that the property which accompanied him was not baggage in the ordinary sense of the term, but consisted of samples of goods carried by him for purposes of sale. The defendants in error might not have been bound at common law to receive Fisher with such property as baggage, but they did so receive him, and as they knew the nature of the property which he carried, they were liable, at common law, for subsequent loss. Having received the guest, without objection as to the character of the prop-

erty claimed by him to be his baggage, the defendants in error, because of their knowledge of its character when so received, would have been held to have waived all rights to raise a question as to whether the property fell within the designation of baggage. The situation would have fallen within the rule recognized in *Hannibal R. R. vs. Swift*, 12 Wall. 262, where it is held, that in the case of a common carrier, if at any time a reasonable ground exists for refusing to receive and carry passengers applying for transportation, with their baggage and other property, it is the duty of the carrier to insist upon such ground if desirous to avoid responsibility If not thus insisting, it receives the passengers and their baggage and other property, its liability is the same as though no ground for refusal had ever existed, Such would have been the situation in the absence of the Statute.

The question now is, whether the Statute, in any manner, changes the rule of liability in view of the circumstances of the case before the Court. Undoubtedly, the purpose of the legislature in enacting the Statute, was to limit the liability of innkeepers. The Statute provides:

"No innkeeper in this State shall be liable for the loss of any baggage or other property of a guest caused by fire not intentionally produced by the innkeeper or his servants, nor shall he be liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such merchandise for sale or sample in his possession after entering the inn, *nor shall the innkeeper be compelled to receive such guest with merchandise for sale or sample*; but innkeepers shall be liable for the losses of their guests, caused by the theft of such innkeeper or his servants, anything herein to the contrary notwithstanding."

The statute contemplates two situations: One, where the guest does not disclose the nature of what he claims to be his baggage—in which event while the innkeeper is bound to receive the guest, he will not be liable for the

loss of merchandise carried on sale by the guest, unless the latter gives the notice after entering the inn; the other, where the innkeeper knows the nature of the property carried by the would be guest, in which event if it be merchandise for sale, or sample, he is not obliged to receive the would be guest at all.

The case made by the present record is that of a guest who was known to be carrying goods on sample and for sale, who had notified the hotel proprietors by mail of his desire for a room, and who was received without objection upon his arrival. Having lost his goods by theft, he looks to the innkeeper for remuneration and is answered, that while the character of his property was well known, yet he is not entitled to a recovery for its loss because he failed to give a written notice of the existence of a fact of which the innkeeper was fully advised when the guest came to his inn and in the light of which fact the guest was received without objection. After the guest had been received, the innkeeper caused him to be moved to another room, and the record at pages ten and eleven shows how careful the representative of the plaintiffs in error was to preserve their property and how fully the defendants in error were advised of its nature. Yet with all of the personal knowledge on the part of the innkeeper as to the nature of the goods carried by his guest, the defendants in error contend that they are to be freed from all liability because they did not receive a notice in writing that the goods of the guest were carried on sample or for sale.

I submit that the enactment is one simply for the protection of the innkeeper. The Legislature intended to protect him, by enabling him, upon being advised of the nature of the guest's goods, to determine whether he de-

sired to longer entertain such guest. Where the goods carried by the guest are known to the innkeeper to be on sample or for sale, the innkeeper is not bound to receive the guest at all. He may lawfully decline to receive him. Where the guest, after he has entered the inn, gives notice that he is carrying goods on sample, or for sale, the innkeeper may then decline to remain responsible for such goods and refuse to farther entertain such guest. The purpose of the Legislature being to protect the innkeeper merely, the statute ought not to be so construed as to make it a mere technical stumbling block in the way of guests. Actual notice given to the innkeeper, whether in writing or otherwise, satisfies the purpose of the statute, and the reception of a guest and his continued entertainment without objection, where the innkeeper knows that he has goods on sample, or for sale, should be held to be a waiver of the statute if it be held, that actual notice will not satisfy the requirements of written notice. A leading case which illustrates the proposition for which I contend is *Purvis vs. Coleman*, 21 New York, 111. The action was to recover money abstracted from the plaintiff's trunk while a guest of the defendants. On the trial, it was proved that the defendants were proprietors and keepers of a hotel in the city of New York. On January 23, 1856, they received the plaintiff as a guest. He was assigned a room in the house and was escorted to it, with his baggage. About five o'clock, on the day of his arrival, the plaintiff left his room for dinner, locking his door and leaving the key at the office of the hotel. On his return, about six o'clock, he found his room had been broken into, his trunk broken open and four hundred sovereigns taken therefrom.

The laws of New York provided, that whenever the proprietor of any hotel should furnish a safe in the office of such hotel, or other convenient place, for the safe keeping of any money, jewels or ornaments belonging to the guests of such hotel, and should notify the guests thereof by posting, in a conspicuous manner, in the room occupied by such guest, a notice, stating the fact that such safe had been provided, in which such money, jewels or ornaments might be deposited, and such guest should neglect to deposit such money, jewels or ornaments in such safe, the proprietor of such hotel should not be liable for any loss of such money, jewels or ornaments sustained by such guest, by theft or otherwise.

The jury found, among other things, that the notice required by this law was not posted in the room to which the plaintiff was assigned, but that a notice in fact was given to the plaintiff upon his arrival, that the defendants had provided a safe for the deposit of valuables, and that they would not be liable for any loss unless such valuables were deposited in the safe thus provided for their keeping.

Holding that notice in fact satisfied the requirement of the statute, the Court say:

"The actual notice given to the plaintiff was far more full and ample than the constructive one provided for in the act of the legislature. The notice to be posted by the act was only to state the fact that such safe was provided, in which such money, &c., might be deposited. That was all the constructive notice the act required. It is easy to perceive that if such notice was brought to the attention of a stranger, he might well fail to perceive that there was anything in it changing or modifying the duties or liabilities of the proprietor, in respect to the safety of the property of his guest. He would see from this statutory notice, if he read it, that a safe was provided in which his money might be deposited, but it would fail to inform him of any consequences attending his not availing himself of its use. The notice actually given in the present case distinctly brought to his mind not only the fact of the safe being provided, but the

reasons for such provision, and the important fact that if the guest did not avail himself of this place of safety for his money, in case of its loss, he could have no claim upon the proprietor of the hotel. The actual notice, therefore, given in this case, was far more satisfactory and ample than the constructive one required by the statute, and the question is, whether the defendants were protected by that act, in giving this notice, and omitting to post that prescribed by the statute? There can be no controversy, that an actual notice is far more certain to bring knowledge of a fact to a party than constructive notice. We certainly must be permitted to look at the object of the legislature in passing this act and in making the provision as to notice, which it contains. It was certainly to limit the liability of hotel-keepers, and to provide means by which they might restrict it. It was also the object of the Legislature to provide for the security of the guest, and not to deprive him of the rights secured to him by the common law, without special notice of the provisions of this act. It must have been seen by the framers of this act, that it would have been a difficult matter, in a large hotel, receiving three or four hundred guests daily, to give personal notice to each guest of the requirements of this act, and preserve evidence of such notice. The legislature, therefore, in addition to the knowledge which every man is presumed to have of the law, thought proper to provide in this particular case, that the putting of a notice in a conspicuous place in the room occupied by the guest, stating the fact that a safe was provided in which his money might be deposited, should be *prima facie* evidence of notice to him of the act. The mode and manner of giving the notice was, therefore, clearly for the benefit of the hotel keeper. It is easily seen that the chances of its attracting the attention of the guests were small; and even if it did, and stated only what the act requires, it would fail to inform him of the advantage secured by the act, and the consequence which would follow, in case he did not avail himself of the use of the safe."

"We think, therefore, the actual notice given in this case contained more full information than the statutory notice, and that the object and purpose of the act have been more than complied with. We do not see that the precise mode of giving the notice specified in the act, and in the precise form prescribed by it, are essential to the protection of the defendants. We must look at the substance of things, and not be led away by forms."

This case, upon another point, has the approval of this Court, in *Elcox vs. Hill*, 98 U. S. 224.

I submit that the case there cited is conclusive upon the point for which I contend. Actual notice was given the defendants in error of the nature of the goods. The guest was received with full knowledge that he was a

"traveling man," and carried goods on sample and for sale. He was assigned to a room by the proprietor of the hotel, and that location was afterwards changed to suit the wishes of such proprietor.

In the room to which the representative of the plaintiffs in error was originally assigned were placed tables upon which goods were to be shown, and those same tables were set up again in the room into which the guest was moved, at the instance of the proprietors.

In the face of such acquiescence on the part of the defendants in error in the acts of the guest, in the face of their unqualified acceptance and entertainment of him as their guest, and in the face of their full knowledge of the nature of the goods which the guest had in his possession, to insist that the statutory requirement of notice was neither satisfied nor waived, is to enlarge the statute beyond the intention of the legislature, and to give an effect to it which could never have been in view when the enactment became the law of the State.

I respectfully submit that the judgment should be reversed and the cause remanded.

Chester A. Keim

For Plaintiffs in Error

121-383

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D., 1886.

WILLIAM M. FISHER AND THOMAS DUBOIS,
Plaintiffs in Error.

vs.

EZRA KELSEY AND HENRY A. LANMAN, EXECUTORS OF WILLIAM KELSEY, DECEASED, AND BENJAMIN STICKNEY.

No. 173.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT, POINTS AND AUTHORITIES AND ARGUMENT OF DEFENDANTS IN ERROR.

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STATEMENT.

PETITION.

The plaintiffs complained in their petition of the defendants therein because of a loss at the Planter's House, St. Louis, Missouri, an inn kept by defendants, of a large amount of gold vest chains, necklaces and pencil cases, of the value of over twelve thousand dollars. The petition contained the following averment:

(Transcript, p. 4.) "May 12th, 1878, one of the plaintiffs, Wm. M. Fisher, was received by defendants into their inn as a traveller, together with the baggage and goods of said Fisher and plaintiffs, consisting in part of articles of gold manufacture, the same being *merchandise for sale and sample*, belonging to and being the property of plaintiffs."

ANSWER.

The answer by special denials, put in issue all the affirmative matter of the petition, and set up also the following affirmative defense, (transcript, p. 6, last paragraph.)

"And further answering, these defendants say that said Fisher, whether acting for himself or for said plaintiffs, as a guest did not give written notice to defendants of having any merchandise for sale or sample, belonging to plaintiffs in his or their possession after entering defendants' inn; and defendants say said alleged loss or losses of said plaintiffs was not caused by the theft of these defendants or their servants, and that because of said failure to give written notice as required, defendants were exempt by law from any liability because of any loss of said goods mentioned or any part thereof in manner and form alleged."

REPLICATION.

The replication (transcript, p. 7,) *denied each and every* allegation of the answer.

The case was tried and disposed of upon this special defense in favor of the defendants, and we shall proceed to state the law and facts of record to show that this was legally done, and there is no valid exception to the action of the Court.

THE LAW.

The statute law of Missouri was, at the time of the alleged loss, as it is set forth in transcript pp. 15, 16, although it is there set forth as part of certain papers introduced in evidence by defendants.

These papers were intended to establish the first affirmative defense of the answer, but under the charge of the Court this became unnecessary, and the testimony as to posting required by first section is therefore not complete in the transcript. The papers are useful in the record now *only as a ready reference for the law*. The law is correctly printed in them. The original act "Concerning the liabilities of inn-keepers" is to be found in "Revised Statutes of Missouri," 1855, Vol. I, pp. 857, 858.

Of this act Sec. 2 was as follows:

"No inn-keeper in this State shall be liable for the loss of any baggage or other property of a guest, caused by fire not intentionally produced by the inn-keeper or any of his servants; but any inn-keeper shall be liable for any loss of any guest in his inn, caused by the theft or gross negligence of the inn-keeper, or any of his servants, anything to the contrary thereof in this act notwithstanding."

This act of 1855, by the due enactment of the General Assembly, March 20, 1866, became chapter 99 of the "General Statutes of Missouri, 1865," and was then styled "Of inn-keepers and their responsibility to their guests." See "General Statutes of Missouri, 1865," pp. 422-3. In the preface of these statutes is given the history of the legislation authorizing them. It is not deemed material to set it forth here.

By an act approved April 1, 1872, (see Laws of Missouri, 1871-2, p. 55.) (adjourned session of 26th General Assembly,) entitled "An act to amend section two (2), of chapter ninety-nine (99), of the General Statutes of the State of Missouri, entitled 'of inn-keepers and their responsibility to their guests,'" it was provided:

Sec. 1. "Section two (2) of chapter ninety-nine (99) of the General Statutes of Missouri," is hereby amended so as to read as follows: "No inn-keeper in this State shall be liable for the loss of any baggage or other property of a guest, caused by fire not intentionally produced by the inn-keeper or his servants; *nor shall he be liable for the loss of any merchandise for sale or sample belonging to a guest unless the guest shall have given written notice of having such merchandise for sale or sample in his possession after entering the inn; nor shall the inn-keeper be compelled to receive such guest with merchandise for sale or sample;* but inn-keepers shall be liable for the losses of their guests caused by the theft of such inn-keeper or his servants, anything herein to the contrary notwithstanding."

This was the statute law at the time of the trial, and at the trial the judge charged the jury as follows: (Tr. p. 20.) "The Court instructs the jury, at the time in the petition mentioned as that at which the matters complained of are stated to have occurred, no inn-keeper in the State of Missouri was liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest should have given written notice of having such merchandise for sale or sample in his possession after entering the inn, unless the loss of the guest was caused by theft of the inn-keeper or

his servants; and inasmuch as the evidence here shows that these goods were kept in the hotel for sale or sample, and there is no evidence tending to show that there was any written notice as the statute required, and no evidence tending to show that the theft was caused by the inn-keeper or his servants, it follows that you must return a verdict for the defendants, and this you can do without leaving your seats."

The plaintiffs' exception is stated as follows:

"To the giving of this charge to the jury, the plaintiffs at the time duly excepted."

The Court also refused the following:

CHARGE ASKED BY PLAINTIFFS.

"The Court is asked to charge the jury that "if they (the jury) believe from the evidence that the defendants in this case, *at the time they received* the plaintiff, William M. Fisher, and his goods, as a guest in their inn, had knowledge and information that he had *in his trunk* goods and merchandise for sample and sale of the *character and kind* spoken of by witnesses; and if the jury further find from the evidence that the defendants, notwithstanding they had *such knowledge*, *accepted* said Fisher with his goods and merchandise, as a guest, and assigned and gave him a room in their inn usually occupied by commercial travelers, having such goods for sale and sample, and furnished said Fisher such things and conveniences in the said room so assigned to him, for the use and convenience of his trade; and if the jury further find from the evidence that the defendants did not *after* they *knew or had knowledge* that said Fisher had such property in his possession for sample and sale as aforesaid, *refuse to receive* him as a

guest with his property in said inn, then the jury may find that the defendants waived the requirement of written notice, *mentioned in the act approved April 1, 1872.*"

The italics are ours and meant to draw attention to certain features of this instruction (aside from its general purport), because there is no evidence whatever to support it, as to these.

The exception is that the Court refused to give the charge aforesaid, and they (the plaintiffs) duly excepted to the ruling of the Court. (Tr. p. 20, foot.)

THE EVIDENCE.

The evidence does not display when the loss occurred, nor what amount of goods was lost. But the following points are exhibited as here stated, and, as as we believe, not otherwise.

1st. That Mr. Fisher arrived the last time before the alleged loss, on May 12th, 1878, Sunday. That Mr. Kelsey knew Mr. Fisher as a dealer in jewelry for many years before this, (Tr. p. 8.), and as Mr. Fisher swears (although it is denied by Mr. Kelsey), Mr. Kelsey was in Fisher's room at the Planter's House after the goods were opened. (Tr. p. 10, top.)

But the testimony does not show whether this was before or after the loss; nor does it show that Mr. Kelsey's attention was drawn to the merchandise for any particular purpose; to either their amount or value; and it does distinctly show that Mr. Kelsey did *not* know of Fisher's coming at the time he came to the hotel.

The testimony on these points is as follows: (Tr. p. 9.)

Q. Do you know whether Mr. Kelsey knew of your coming at that time?

A. Do you mean when I arrived there at that time?

Q. Yes, sir.

A. I don't think he did. (Tr. p. 13, top.)

Q. How recently the last time you were there was it he was in your room before this occurrence?

A. He was in my room on *Monday* the 13th.

Q. And saw your goods?

A. The goods were open at the time.

It also appears (Tr. p. 12) that Fisher had before brought as much as $40,000 worth of goods to the Planter's House; and at the particular time of the alleged loss, had between $21,000 and $22,000 worth.

2d. That before Fisher left Chicago, on the evening of May 11, he wrote and mailed a postel card, which was substantially as follows: (Tr. p. 101.)

On the address side;

WILLIAM M. FISHER & CO.,
Manufacturers of Gold and Silver Chains, &c.
2608 Eddie Street,
Providence, Rhode Island.
Post Office Box 682.
(Written)
Planter's House,
St. Louis.

On the reverse side (Tr. p. 14,) (bottom) and p. 15 (top)

Written.)
Planter's House, May 12th,
William M. Fisher.

That this postal card came down from Chicago on the night of May 11th, and was delivered on the 12th between 11 and 12 o'clock, (Tr. p. 9,) *after Fisher's* arrival.

Mr. Fisher says this postal was an *order for a room*. See his testimony. (Tr. p. 10.)

Q. Yes, sir. It was addressed to the "Planter's House, St. Louis."

A. Yes, sir; with a *notice for a room* on the other side, of course.

* * * * * * * *

Q. Was there anything on the other side?

A. On the other side was *an order for a room*, May 12th, in the Planter's House.

He also states that their "business" was that *printed* on the card as above set forth on the card. (Tr. p. 10.)

Mr. Fisher also shows that Mr. Kelsey deemed the postal an order for a room and nothing more. (Tr. p. 9, bottom.)

Fisher's testimony:

Q. Did you see it after you came here?

A. I saw it after I came here; it didn't come down on Friday night; it came down on Saturday night, and it was delivered in the morning between 11 and 12 o'clock.

Q. Did he, Kelsey, make any remark about it?

A. He made a laughing remark; and said it was rather late notice for me, *if I wanted a room*, four or five hours after I had been in the hotel.

Q. Did he make any objections to your being in the house?

A. He did not, sir; he treated me with the greatest civility always.

(Tr. p. 10, top.)

Q. Can you describe whether there was anything done with the card?

A. *It was our usual printed card:* I saw Mr. Kelsey throw it into the waste basket as usual.

3rd. That Mr. Fisher paid his board bill at about three dollars and a half, or three dollars and seventy-five cents a day. (Tr. p. 11.) Whether this was more than usual he does not distinctly say, although he thought the usual price was three to three and a half.

4th. (Tr. p. 13.) "On cross-examination, this witness (Mr. Fisher), gave testimony (pp. 13 and 14), showing that the theft complained of had been perpetrated by a man by name of Billy O'Brien, a reputed burglar, who was described by the witness and who was supposed by him to have slipped into the room, and who was not a servant of the defendants?

(P. 13, Fisher, cross-examination.)

Q. Did you state formerly, when *you attempted to force* the door open, that Billy O'Brien had opened by force, you found it stuck?

A. He had found it open, or he never could have got in there.

Q. Did you state that?

A. I think I did.

* * * (Tr. p. 14.) "Q. He was a burglar and had the reputation of being a man that could go through a very small space?

A. He was the man, I was told by a detective—was seen by a man to enter the room."

Mr. Kelsey also testified, that Fisher told him the room had been entered by a burglar.

The motion for a new trial, (Tr. p. 21,) was based on the above charge and refusal, and also because the verdict was given for defendants by the positive and express direction of the Court, without consi-

deration by the jury of any of the evidence in the case, and because the verdict was against the law and the evidence, and should have been for plaintiffs. This motion was overruled, and the exception preserved is "To which ruling of the Court the plaintiffs duly excepted." (Tr. p. 21.)

The verdict was for defendants on April 7th, 1883, and judgment rendered accordingly at that time.

William Kelsey, one of the defendants, died after the cause was brought to this Court, and his executors have been made parties.

POINTS AND AUTHORITIES.

I. *The Statute of Missouri as it stood at the time of the loss complained of, May 1878, enacted* "an inn-
" keeper shall not be liable for merchandise for sale or
" sample belonging to a guest, unless the guest shall
" give written notice of having such merchandise for
" sale or sample in his possession after entering the inn,
" unless the loss is by theft of the inn-keeper or his
" servants, nor shall the inn-keeper be compelled to
" receive such guest with merchandise for sale or sample."

Acts 1871–2, p. 55. (adj. Session 26th Genl. Assembly.) This has been the statute ever since. R. S. Mo. 1879, Vol. II. p. 1133, Sec. 5786.

This clause was inserted for the protection of inn-keepers, in connection with the clause exempting them from loss by unintentional fire, which had been enacted before. The section was before 1872, in the following language:

" Sect. 2. No inn-keeper in this State shall be
" liable for the loss of any baggage or other property
" of a guest caused by fire not intentionally produced
" by the inn-keeper or his servants; but inn-keepers
" shall be liable for the losses of their guests caused by
" the theft or negligence of the inn-keeper, or of his
" servants, anything herein to the contrary notwith-
" standing."

Revised Statutes of Missouri, 1855, Vol. I. pp. 857 858. General Statutes of Missouri, 1865, pp. 422, 423.

The Statute as it existed at time of the trial required a notice to be given by the guest with the following particulars:

1st. In writting; 2nd, of having merchandise for sale or sample in his possession; 3rd, after entering the inn. If this notice was given, the inn-keeper had the privilege to refuse to *receive* the guest.

If the guest secured a lodgment in the inn otherwise than upon such notice, he took the risk of loss upon himself, save only that that might be caused by theft by the inn-keeper or his servants.

II. *There was no such notice given.*

The order on a postal card for a room by Mr. Fisher is no such notice; was neither sent nor received as such; nor did it comply with the requirements of the statute either expressly or by implication, nor was it received before the guest was already received.

See the abstract of testimony relating to it set forth in defendants' statement above.

III. *There was not only no written notice, but defendants had no knowledge or information whatever when Mr. Fisher entered the inn, of his having in his possession merchandise for sale or sample.* (See Fisher's testimony, Tr. p. 9.) Mr. Kelsey did not know of his coming when Fisher first secured a room; and the others about the house are not shown to have had any knowledge of what Mr. Fisher had then or had had on any previous occasion.

IV. *The testimony of the plaintiff, Fisher, conclusively proved that the alleged loss had not occurred by theft of the defendants or their servants.*

We have quoted, in our statement of the case, the statements of Mr. Fisher that the loss was by a burglar named Billy O'Brien. There was at the trial no pretence of claim that it was otherwise.

V. *The charge of the Court was therefore justified.*

This charge stated four propositions: 1st, that the inn-keeper was not liable for the loss alleged, unless he had been given the written notice described; 2nd, that there was no evidence tending to show such notice; 3rd, that there was no evidence tending to show theft by defendants or their servants; 4th, that the jury must find for defendants.

This was a legal charge.

"The jury may be controlled in their determination by a peremptory instruction, if the testimony is "of such a conclusive character as would compel the "Court, in the exercise of a sound legal discretion, to "set aside a verdict if one were returned in opposition "to such testimony."

Montclair vs. Dana, 107 U. S. Rep., S. C. 162, and cases there cited.

Marshall vs. Hubbard, 117 U. S. Rep., S. C. 415, 418, 419.

VI. *There was no sufficient exception preserved to the charge.*

It contained several distinct propositions, and the exception was to the whole charge. This does not enable this Court to review it.

Lincoln vs. Claflin, 7 Wallace Reps. 132, 139.

Connecticut &c. Co. vs. Union Trust Co. 112 U. S. Reps., S. C. 250, 261.

Burton vs. West Jersey Ferry Co., 114 U. S. Rep., S. C. 474, 476.

VII. *The charge asked by the plaintiffs was properly refused.*

1st. The charge is based upon the supposition of evidence that the defendants had knowledge "*at the time they received the plaintiff, Fisher, and his goods.*"

that he had in his trunk, goods and merchandise for sample and sale of the character and kind spoken of by witnesses.

There is no such evidence.

It also supposes testimony that this knowledge existed at a time after which defendants might have refused to *receive* plaintiff, Fisher, as a guest.

There is no such evidence

2nd. Of the express requirements of the statute set forth in defendants' answer there was *no waiver pleaded* in plaintiffs' reply; but on the contrary the reply denied the averment that there had been no written notice.

~~There is no such evidence~~.

The rule of pleading adopted by Supreme Court in Missouri must prevail in this case.

R. S. U. S., Sec. 914, page 173.

Under these pleadings, a waiver could not be shown as a defence in Missouri.

Nichols, Shepherd & Co. vs. Larkin, 79 Mo., 264, 271.

First National Bank vs. Virginia &c. Co. 78 Mo. R. 13–24.

Pier vs. Hemrichoffer, 52 Mo. R. 333.

Mack et al. vs. Lancashire Ins. Co., 1 Fed. Reporter, 193.

The petition itself should, by its averments, have shown the statute complied with. It did not, but the answer supplemented it as to this. By the denial in the reply, the affirmation of *notice* was on plaintiffs, and it was as if they had alleged notice in the petition.

3rd. It also described the thing waived as the written notice "*mentioned in the act of April 1st, 1872.*" This would have been a blind and misleading direction

to a jury. The plaintiffs maintain a postal card asking for a room complies with the statute—what a jury might have thought the statute required and what would have been a sufficient compliance, no man can tell. It was a question of law what the written notice was that the statute required, and could not be referred to the jury.

Hickey vs. Ryan, 15 Mo. R. 63-67.

Hudson vs. St. Louis &c. Co., 53 Mo. R. 525-539.

4th. The facts mentioned in the plaintiffs' instruction, had there been evidence to support them, would not have established a waiver.

The statute was express, demanding written notice; each party acted on knowledge of this statute; and until the plaintiff moved, by giving statutory notice, the conduct of the defendants could not be said to be inconsistent with their right to notice. It may be likened to the conduct of one relying on a verbal contract for the sale of land. There is no equity arises upon it. A complainant has no reason to rely on it.

Dunphy vs. Ryan, 116 U. S. R., S. C., 491-498.

Browne on Statute of Frauds (4th Ed.) § 115, a.

5th. The statute requires the written notice after entering the inn, without qualification, before the party shall be able to establish such a relation to the proprietors as will put his merchandise for sale or sample at the inn-keeper's risk, because it also enacts the inn-keeper shall not be compelled to *receive* such guest.

The rule is a reasonable one. It was in support of the rule laid down by many authorities.

Some of these had held an inn-keeper should be liable only for articles of wearing apparel, and for per-

sonal use and convenience, such as travelers ordinarily carry with them.

Giles vs. Fauntleroy, 13 Maryland R. 126.

Pettigrew vs. Barnum, 11 Maryland R. 434.

Treiber vs. Burrows, 27 Maryland R. 130.

Sassen vs. Clark, 37 Georgia R. 242.

Salie vs. Cardinal, 35 Wisconsin R. 118.

Others had held that if a guest take a room for business, distinct from his accommodation as a guest, the special responsibility did not extend to goods lost or stolen from that room.

Burgess vs. Clements, 4 Maule & Sel. 306.

Farnsworth vs. Packwood, 1 Holt. N. P. 209, S. C., 1 Starkie N. P. 249.

Carter vs. Hobbs, 12 Michigan R. 57.

Salie vs. Cardinal et al., 35 Wisconsin R. 118.

Myers vs. Cottrill, 5 Bissel R. 465.

The right given the inn-keeper to refuse to receive the guest if he gave the notice upon entering the inn, was itself destructive of the old rule as held by the stricter authorities; for the obligation of the inn-keeper to respond for any injury to or loss of the guest's property depended upon the obligation to receive him.

Mower et al. vs Fethers, 61 New York R., 34–38.

Ingallsbee vs. Wood, 33 New York R., 577.

VIII. *The verdict was for the right party, and there is nothing to retry.*

No negligence of defendants was attempted to be shown. There was shown a burglary by a known person other than the inn-keeper or his sevants.

There was no attempt of the plaintiff to comply with the statute, and if a waiver had been possible it was not pleaded; there was no proof to show it; and

there was no proof to support the particular facts on which plaintiff based the charge asked as to waiver and which the Court refused. The plaintiffs failed to bring themselves within the protection of the statute by either their pleadings or their proofs.

ARGUMENT.

This case is important to the defendants because of the large sum for which it has been sought to hold them liable, now through many years of litigation. But it also interests all inn-keepers in Missouri, as it involves the construction of a section of a statute of the State upon which no other decision has been rendered than that of Judge McCrary in this case below.

The statute is evidently the outgrowth of a just State policy, whereby the relations of guest and inn-keeper are put upon a fairer footing than was, in the judgment of many Courts, allowed under the strict rules of the common law.

The facts of this case itself best exemplify the necessity for the statute. Mr. Fisher, one of the complainants, testifies, that representing his business house, he traveled over the country carrying with him for sale and sample often as much as Forty Thousand Dollars worth of gold chains and necklaces, and that he took into the defendants' inn, on the occasion of the visit when he claims to have met the particular loss sued for, between Twenty-One Thousand and Twenty-Two Thousand Dollars worth of this kind of merchand ise. A merchandise of the greatest value compared with its bulk, and therefore easily concealed, lost or stolen, and against loss or assertion of loss of which the inn-keeper would be least able to protect himself.

To put upon inn-keepers the strict responsibility of insurers for such vast sums, held for such purposes, requires the strictest view of the law as it was applied in past times, and under circumstances and a condition of society very different from those of this period. Many Courts, indeed, had, both in England and this country, refused to extend the rule to cover a loss such as is claimed to have happened in this case.

In Burgess vs. Clements, (4 Maule & S.) it was held that if a guest take a room for business, distinct from his accommodation as a guest, the special responsibility did not extend to goods lost or stolen from that room; and in Farmsworth vs. Packwood, (1 Holt N. P. 20., S. C., 1 Starkie N. P., p. 249,) it was said that a landlord was not bound to furnish a shop to every guest. If a traveler applies for a room, not to sleep or live in, but as a shop or warehouse, and he takes an exclusive possession, he exonerates the landlord.

Commenting on these authorities, Judge Redfield in his work on Common Carriers and other Bailees, § 580, says: That an inn-keeper as such is not responsible for the safe custody of goods placed in a room for sale, any further than he consents and contracts to become so. In Salie vs. Cardinal, (35 Wisconsin R., 118,) the Court states that "an inn-keeper is not bound by law to find show-rooms and salesrooms for his guests in which to expose or sell his goods, but only suitable lodging rooms or lodging, and if the guests use their rooms for such exposition or sale this constitutes an exception to the general liability of the inn-keeper, and he will not be held responsible for the loss of such goods. So also Judge Drummond de-

cided, that as to merchandise in possession for sale or sample the special obligations of the common law did not apply.

Myers vs. Cottrill, 5 Bissell, R., 465.

Besides this, other authorities had held an inn-keeper should be held liable only for articles of wearing apparel and for personal use and convenience, such as travelers ordinarily carry with them.

Giles vs. Fauntleroy, 13 Maryland R., 126.
Pettigrew vs. Barnum, 11 Maryland R., 434.
Freiber vs. Burrows, 27 Maryland R., 130.
Sassen vs. Clarke, 37 Georgia R., 242.

Under this state of the authorities, the statute in question was enacted to give a rule by compliance with which only could the inn-keeper be held, under any circumstances, by guests having their goods in posession for sale or sample.

If such a guest in Missouri seeks to hold the inn-keeper liable for such merchandise, he is required to give written notice of the goods he has in possession after entering the hotel; and it is further provided in the same clause of the statute that the inn-keeper is not compelled to receive such guest. Thus any old rule as claimed by some, nursed by the common law, was rendered void by the statute and a special requirment enacted.

The obligation to receive the guest was, under the old rule, equally binding with the obligation to respond for his goods. Indeed, the authorities based the latter obligation upon the former.

Mower et al. vs. Fethers, 61 New York R., 34-38.
Ingallsbee vs. Wood, 33 New York R., 577.

And we submit the statute clearly intends that the notice shall be given after entering the inn, but before the guest is received.

The statute was of slow growth and appears to have been considerately adopted. In its first form, as enacted in 1855, (R. S. Mo., 1855, Vol. I. pp. 857-858,) it relieved the inn-keeper only from loss by unintentional fire. This form was preserved and became chapter Ninety-nine of the General Statutes of Missouri, 1865. (See G. S. of Missouri, 1865, pp. 422-3.)

It was not until April 1, 1872, that the clause under consideration was enacted. This was inserted into the same section which had already relieved from loss by unintentional fire, and re-enacted the whole section. (Acts 1871-2, p. 55.)

The first section of these acts had made provision for relief, upon putting up notices of the act and keeping a safe against loss of such goods as were therein enumerated. But the second section was an independent provision, and embraced the clause of 1872, an entirely new kind of goods—that in possession for sale or sample.

The business transacted by commercial travelers had become so extended, and the bulk of their goods carried through the country so great, that the first section of the act had become utterly inadequate and inapplicable, and this unquestionably led to the clause relating to merchandise possessed for sale and sample.

When it is considered that this merchandise was of immense value, and any inn in the land was apt to hold of it at any business season of the year values exceeding often that of the inn itself; enough of it, indeed, were it lost at the inn and the old rule held applicable,

to hopelessly bankrupt the inn-keeper, it may be said the law was imperatively demanded by justice. Its provisions are very plain and direct; "nor shall the inn-keeper *be liable* for the loss * * * * unless the guest shall have given written notice * * after entering the inn—nor shall the inn-keeper be compelled to receive such guest."

One who *enters* an inn does not thereby become a guest. The host may refuse to receive him as such. It is here provided that if the particular person wishes to hold the inn-keeper for possible loss of his merchandise, he shall give written notice, not after he has become a guest; not after he has acquired a lodging; but after entering the inn, and while the innkeeper is yet free to receive him or reject him as a guest. It is said by Judge Redfield, as we have quoted above, a guest with such merchandise and demanding accommodations could not hold the inn-keeper at all without a special agreement. Here the statute intends to bring the contracting parties face to face upon the question, and puts the *initiative* on the *traveler*. He must challenge the inn-keeper by the written notice. If he avoids or neglects this, the risk is his own. It is very analogous to the Statute of Frauds, and the reasons supporting our views are the same as have been held to support that statute. This honorable Court in Dunphy vs. Ryan, 116 U. S. Rep., S. C. 491, on page 498 says, speaking of the latter statute, (Woods, J.,) "The "only complaint of misconduct on the part of the plaint- "iff which can be inferred from the pleadings, is his "refusal to perform a verbal contract for the purchase "of lands. * * * The defendant knew, or ought "to have known, that the statute requires such a con-

" tract as the one he seeks to enforce to be evidenced
" by writing. That he did not exact a contract in
" writing is his own fault. Courts of Equity are not
" established to relieve parties from their own negli-
" gence or folly. The Statute of Frauds is founded in
" wisdom and has been justified by long experience.
" As was said by Mr. Justice Grier in Purcell vs. Mi-
" ner, *ubi supra*, the statute ' is absolutely necessary
" to preserve the title to real property from the chan-
" ces, the uncertainty, the fraud attending the admis-
" sion of parol testimony. It should be enforced.' "

Every suggestion here made is applicable to the statute under consideration. It is necessary to protect inn-keepers from chance, uncertainty and fraud, that the notice should be in writing. Such is the statute, and it should be enforced.

If this view prevails, it ends the case, for no such notice was given, and the proof was that neither the defendants nor their servants stole the goods.

We will not argue the absurd proposition that the postal card order for a room, sent from Chicago and received hours after Mr. Fisher was lodged in the inn, was the statutory notice required. It was not sent as such, nor so received. It did not state anything as to what Mr. Fisher had or would have in his possession upon arriving. The only goods mentioned in it were those in Providence, Rhode Island. It proved nothing and tended to prove nothing pertinent to the issues. The Court below rejected it without comment, and we think we may be excused from discussing the matter further.

If there was any question as to how the goods were lost, it devolved upon the plaintiff to prove that the defendants or their servants stole them.

Elcox vs. Hall, 98 U. S. R., S. C., p. 218.

In that case the Court affirms a judgment based upon a charge to the effect stated. See top p. 221.

In the present case, however, the plaintiff, Fisher, testified that the loss was by a burglar, not one of the defendants or their servants; by name, Billy O'Brien. Mr. Fisher volunteered the statement that a detective had told him that this man had been seen to enter the room. There was much more to support this fact. If there was any legal presumption against defendants, it was completely removed.

There was therefore nothing to submit to the jury upon the testimony, and the Court properly directed the verdict for the defendants.

Upon the question of waiver, if such a question is reached, we have pointed to the Missouri authorities declaring that, to be available, such a reply must be pleaded. It was not. There was no statement of facts in the pleading warning the defendents of any such avoidance of their defense based on the statute; and the attempt to raise it upon an instruction was properly defeated. Moreover, it may be said the pleadings amounted, taking the petition, answer and reply together, to an affirmance of written notice under the statute. This is what the petition should have done in the first place, for the statute says no inn-keeper shall *be liable* for goods in possession for sale or sample *unless* the notice is given unless stolen by the inn-keeper or his servants. The petition did describe the goods as in possession for sale and sample, and it was necessary it should have gone on and avoided the statute. The defendants, however, chose to plead the statute and want of notice, and when this was denied

by the reply, the legal effect was an averment of notice by plaintiffs, and it should have been proved as laid.

We rely upon all our points as made in our brief; the want of sufficient exception preserved, and the want of sufficient pleading; but will not extend our argument.

We submit that enough has been said and shown to warrant this Court in holding that the statute invoked is a just and valuable law; that a failure to comply with its provisions was a fair defense; that the testimony clearly showed that the defendants were not guilty of any negligence; that they or their servants did not take the plaintiffs' goods; that plaintiffs' representative came to the inn with, as he claims, a very costly kind of merchandise, small in bulk; of gold; easily stolen or lost; and for which, as to amount and value, the defendants could be held on the testimony of the plaintiffs alone, if held at all; that the plaintiffs knew the law of the State and refused to comply with it; and must therefore be held to have assumed all risk of loss by theft of others than the defendants or their servants; that there was no testimony before the jury to show such notice or loss as required. That the learned judge of the Circuit Court therefore charged the jury truly, and so the judgment for the defendants must be affirmed.

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Attorneys for Defendants in Error.

W. H. Phillips
of Counsel

value, at the pleasure of the United States Government, after thirty years; these bonds to be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority. Bonds and coupons payable at the Treasury of the United States. This act not to authorize an increase of the bonded debt of the United States. Bonds to be sold at not less than par in coin, and the proceeds to be applied to the redemption of outstanding 5-20's, or to be exchanged for said 5-20's, par for par. Payment of these bonds, when due, to be made in order of dates and numbers, beginning with each class last dated and numbered. Interest to cease at the end of three months from notice of intention to redeem. See Refunding Certificates, page 36.				per cent. premium.			
FOUR-AND-ONE-HALF-PER-CENT. LOAN OF 1891. (RESUMPTION.)							
The act of January 14, 1875 (18 Statutes, 296), authorizes the Secretary of the Treasury to use any surplus revenues from time to time in the Treasury not otherwise appropriated, and to issue, sell, dispose of, at not less than par, in coin, either of the description of bonds of the United States described in the act of July 14, 1870 (16 Statutes, 272), for the purpose of redeeming, on and after January 1, 1879, in coin, at the office of the assistant treasurer of the United States in New York, the outstanding United States legal-tender notes when presented in sums of not less than fifty dollars.	15 years	Sept. 1, 1891 ..	4½ per cent..	Par to one and one-half per cent. premium.	Indefinite.....	65,000,000 00	65,000,000 00
FOUR-PER-CENT. LOAN OF 1907. (RESUMPTION.)							
The act of January 14, 1875 (18 Statutes, 296), authorizes the Secretary of the Treasury to use any surplus revenues from time to time in the Treasury not otherwise appropriated, and to issue, sell, dispose of, at not less than par, in coin, either of the description of bonds of the United States described in the act of July 14, 1870 (16 Statutes, 272), for the purpose of redeeming, on and after January 1, 1879, in coin, at the office of the assistant treasurer of the United States in New York, the outstanding United States legal-tender notes when presented in sums of not less than fifty dollars.	30 years.....	July 1, 1907	4 per cent...	Par	Indefinite.....	30,500,000 00	30,500,000 00
CERTIFICATES OF DEPOSIT.							
The act of June 8, 1872 (17 Statutes, 336), authorizes the deposit of United States notes without interest by banking associations in sums not less than $10,000, and the issue of certificates therefor in denominations of not less than $5,000; which certificates shall be payable on demand in United States notes at the place where the deposits were made. It provides that the notes so deposited in the Treasury shall not be counted as a part of the legal reserve, but that the certificates issued therefor may be held and counted by the national banks as part of their legal reserve, and may be accepted in the	Indefinite ...	On demand	None.....	Par	No limit	64,780,000 00	29,785,000 00

TABLE N.—*STATEMENT OF of the OUTSTANDING PRINCIPAL of the PUBLIC DEBT, &c.*—Continued.

	Length of loan.	When redeemable.	Rates of interest.	Price at which sold.	Amount authorized.	Amount issued.	Amount outstanding.
CERTIFICATES OF DEPOSIT—Continued.							
settlement of clearing-house balances at the place, where the deposits therefor were made, and that the United States notes for which such certificates were issued or other United States notes of like amount, shall be held as special deposits in the Treasury, and used only for the redemption of such certificates.							
SILVER CERTIFICATES.							
The act of February 28, 1878 (20 Statutes, 26, sec. 3), provides that any holder of the coin authorized by this act may deposit the same with the Treasurer or any assistant treasurer of the United States in sums not less than ten dollars and receive therefor certificates of not less than ten dollars each, corresponding with the denominations of the United States notes. The coin deposited for or representing the certificates shall be retained in the Treasury for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and, when so received, may be reissued.	Indefinite...	On demand...	None.....	Par.....	No limit.....	.....	$139,901,646 00
REFUNDING CERTIFICATES.							
The act of February 26, 1879 (20 Statutes, 321), authorizes the Secretary of the Treasury to issue, in exchange for lawful money of the United States, certificates of deposit, of the denomination of ten dollars, bearing interest at the rate of four per centum per annum, and convertible at any time, with accrued interest, into the four per centum bonds described in the refunding act; the money so received to be applied only to the payment of the bonds bearing interest at a rate not less than five per centum, in the mode prescribed by said act	Indefinite...	Convertible into 4 per cent. bonds.	4 per cent..	Par.....	No limit.....	$40,012,750 00	240,600 00
FUNDED LOAN OF 1881, CONTINUED AT THREE AND ONE-HALF PER CENT.							
These bonds were issued in exchange for five per cent. bonds of the funded loan of 1881, by mutual agreement between the Secretary of the Treasury and the holders, and were made redeemable at the pleasure of the Government.	Indefinite...	At pleasure of the Government.	3½ per cent..	Par.....	.....	.....	302,700 00